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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 PATRICK RONALD HOLLEY,

11 Plaintiff,

No. CIV S-04-1425 GEB PAN P

12 vs.

13 CALIFORNIA DEPARTMENT
14 OF CORRECTIONS, et al.,

15 Defendants.

ORDER

16 Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to
17 42 U.S.C. § 1983. This matter is before the court on plaintiff's motion to file a third amended
18 complaint, and on the court's in camera review of documents submitted by defendant Herrera
19 pursuant to court order.

20 Plaintiff seeks leave to file a third amended complaint to omit all of the claims
21 that have been dismissed from this action due to his failure to file administrative remedies prior
22 to suit and to set forth the sole retaliation claim on which this action is proceeding. (See Order
23 filed July 14, 2006.) Defendant opposes the motion, though principally because in his view the
24 claims in this action were narrowed by the July 14, 2006 order of the district court and this action
25 need not be delayed by further amendment to the pleadings. In the alternative, defendant asks

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1 that, in the event amendment is allowed, his September 29, 2005 amended answer be deemed
2 responsive to the third amended complaint.

3 Good cause appearing, plaintiff's motion to amend will be granted. The Clerk of
4 the Court will be directed to file the proposed amended complaint appended to plaintiff's motion
5 and to docket the pleading as a third amended complaint. Defendant's September 29, 2005
6 answer will be deemed responsive to the third amended complaint unless, within ten days from
7 the date of this order, defendant elects to file a new answer.

8 On May 18, 2006, plaintiff filed a motion to compel production of documents. In
9 that motion, he sought, inter alia, to compel a further response to a request for production of "all
10 documents related to defendant Herrera's 'performance report(s).'" By order filed July 26, 2006,
11 defendant was directed to submit for review *in camera*, a copy of his performance reports for the
12 last five years, or the period of his employment at the Department of Corrections and
13 Rehabilitation, whichever was less. On August 10, 2006, defendant Herrera submitted the
14 required documents. The court has reviewed the document *in camera* and finds nothing therein
15 relevant to, or likely to lead to the discovery of information relevant to, plaintiff's retaliation
16 claim against defendant Herrera. Accordingly, plaintiff's motion to compel a further response to
17 his request for production of defendant Herrera's performance reports will be denied.¹ The
18 documents submitted for *in camera* review will be maintained under seal until further order of
19 court.

20 In accordance with the above, IT IS HEREBY ORDERED that:

21 1. Plaintiff's July 31, 2006 request for leave to amend is granted;

22 2. The Clerk of the Court is directed to file the proposed amended complaint
23 appended to plaintiff's July 31, 2006 motion nunc pro tunc to that date and to docket the
24 proposed amended complaint as a third amended complaint;

25 ¹ Defendant Herrera is reminded that documents sought but not produced in discovery
26 are generally not admissible at trial.

1 3. Defendant Herrera's September 29, 2005 amended answer will be deemed
2 responsive to the claim raised in the third amended complaint unless, within ten days from the
3 date of this order, defendant elects to file a new answer.

4 4. Plaintiff's motion to compel production of defendant Herrera's performance
5 reports is denied; and

6 5. The Clerk of the Court shall maintain the documents submitted for *in camera*
7 review on August 10, 2006 under seal until further order of court.

8 DATED: September 28, 2006.

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11 UNITED STATES MAGISTRATE JUDGE

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